No. 75-1495

In the Supreme Court of the United States

OCTOBER TERM, 1976

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS

v.

WANDA JUNE WEEKS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE SECRETARY OF THE INTERIOR

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INDEX

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Cases—Continued Page

Constitution, treaties, statutes, regulation, and rule: Page

Miscellaneous—Continued Page

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OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-87a)[1] is reported at 406 F. Supp. 1309.

JURISDICTION

The judgment of the three-judge district court was entered on December 18, 1975 (J.S. App. 88a-89a).

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[1] "J.S. App." references are to the appendix to the Jurisdictional Statement of Appellants Delaware Tribal Business Committee, *et al.*, in No. 75-1301.

A notice of appeal was filed on January 16, 1976. On March 4, 1976, Mr. Justice White extended the time for docketing the appeal to and including April 15, 1976, and the jurisdictional statement was filed on that date. The Court noted probable jurisdiction on June 14, 1976, and consolidated the case with Nos. 75-1301 and 75-1335 (A. 107). The jurisdiction of this Court is invoked under 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether 25 U.S.C. (Supp. IV) 1291-1297, which authorizes the payment of funds to members of two federally-recognized tribes of Delaware Indians (and which defines that membership for purposes of the payment) pursuant to a judgment of the Indian Claims Commission, denies due process of law under the Fifth Amendment by excluding descendants of Delaware Indians who severed their relations from the tribe more than a century ago.

CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power * * *
>
> * * * *
>
> To regulate Commerce * * * with the Indian Tribes.

Fifth Amendment:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

The Act of October 3, 1972, 86 Stat. 762 *et seq.*, 25 U.S.C. (Supp. IV) 1291-1297, is set forth at J.S. App. 94a-97a.

STATEMENT

1. The Delaware Indians originally lived on the east coast of what is now the United States but, by the second decade of the 19th century, they were geographically scattered.[2] Although the main branch of the tribe lived in Indiana and Ohio, some members (the Munsee Indians) resided in New York and Canada, while others lived on a tract of land in Missouri that had been granted by Spain in 1793, and still others were located in Texas, Arkansas, and Oklahoma. In the Treaty of St. Mary's in 1818, 7 Stat. 188, the Delawares ceded their lands in Indiana to the United States in return for a promise of land west of the Mississippi River. The Delawares then moved to the Missouri tract, where they remained until 1829 (J.S. App. 6a-7a).

In September 1829, the Delawares signed another treaty with the United States, supplementing the 1818 Treaty, in which they agreed to give up their tem-

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[2] A more extensive discussion of the historical facts outlined in this statement may be found in S. Rep. No. 1518, 90th Cong., 2d Sess. 7-11 (1968), and the opinion of the Court of Claims in *Delaware Tribe of Indians* v. *United States*, 128 F. Supp. 391 (Ct. Cl.).

porary residence in Missouri and to move to a permanent residence in Kansas. 7 Stat. 327. These Kansas lands purported to satisfy the federal government's obligation under the 1818 Treaty to provide the Delawares with a home west of the Mississippi. Although most of the Delawares moved to the land assigned them in Kansas, a substantial group (the Absentee Delawares) settled in Oklahoma, where they have maintained their tribal identity, with chiefs and a tribal council, to the present day (J.S. App. 7a-8a). The Absentee Delawares constitute a federally-recognized tribe.[3]

In 1854, the nucleus of the Delaware Tribe, then living in Kansas, entered into a treaty with the United States in which it ceded most of its lands to the federal government (10 Stat. 1048; J.S. App. 98a-106a). Part of this territory was reserved for the Delawares as a permanent home (the "diminished reserve"), while the bulk of the remainder (the "trust lands") was to be sold by the government at public auction with the proceeds going to the Delaware general tribal fund. In 1856 and 1857, however, the United States violated the terms of the treaty by selling the trust lands, not by public auction, but by private sales at appraised prices. As a result, the Delawares received $1,057,898.19, which was far less than they would have obtained had a public auction been held (J.S. App. 8a; 21 Ind. Cl. Comm. 344, 366).

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[3] The Absentee Delawares, defendants below, have sought review of the judgment of the district court in No. 75-1335, which has been consolidated with this appeal.

In 1866, the Delawares entered into another treaty with the United States in which they agreed to move to Indian Country in Oklahoma (14 Stat. 793; J.S. App. 107a-118a). Under this treaty, the diminished reserve was to be sold and the proceeds used to buy 160-acre tracts of land in Oklahoma for each tribal member. In addition, all adult Delawares were to be given the opportunity either to remove to Oklahoma with the tribe or, instead, to dissolve all tribal relations and to become citizens of the United States. Each Delaware who chose to leave the tribe was to receive fee simple title to an 80-acre plot in the reserved Kansas lands and a *pro rata* portion of the tribal assets "then held in trust by the United States" (J.S. App. 9a, 76a). Article IX of the treaty further provided that Indians electing to become citizens of the United States "shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities" (14 Stat. 796; J.S. App. 77a).

Appellees, who sued as representatives of the so-called "Kansas 'Delawares,'" are the descendants of those Indians who severed all relations with the Delaware Tribe in 1866, to receive their proportionate share of the tribal assets, and to remain in Kansas as American citizens (J.S. App. 9a-10a).[4]

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[4] A total of 21 adults and 49 minors remained in Kansas. Under Article IX of the 1866 Treaty, the minor children of the Kansas "Delawares" were to be considered temporarily severed from the tribe until they became 21 years' old, at which point they could elect either to become citizens of the United States or to rejoin the tribe in Oklahoma. By Act of

By 1867 most of the Delawares had moved to Oklahoma. Pursuant to an agreement with the Cherokee Tribe, each Delaware who enrolled upon a certain register received a life estate of 160 acres of land on the Cherokee reservation. See generally *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127. Although these Indians became members and citizens of the Cherokee Nation, they retained a group identity as Delawares (J.S. App. 10a-11a & n. 12). Their descendants are the Cherokee Delawares, a federally-recognized tribe.[5]

2. In 1951, members of the Absentee Delaware Tribe filed suit in the Indian Claims Commission on behalf of the Delaware Nation to challenge as inadequate the compensation received under the 1818 Treaty. In 1963, the Commission found that the value of the Indiana lands ceded to the United States in 1818 was greatly in excess of the value of the Kansas lands received by the Delawares in return in 1829, and awarded $1,627,244.64 to the Delaware Nation (J.S. App. 12a). 12 Ind. Cl. Comm. 404. Five years later, in the Act of September 21, 1968, 82 Stat. 861

June 22, 1874, 18 Stat. 146, 175, however, Congress declared the minors to be citizens of the United States, appropriated funds to pay them a proportionate share of the assets of the Delaware Tribe, and directed the Secretary of the Interior to issue fee simple title to lands allotted to them in the 1866 Treaty (J.S. App. 11a-12a).

[5] The Cherokee Delawares, defendants below, have sought review of the judgment of the district court in No. 75-1301, which has been consolidated with this appeal. The formal name of this tribe is the "Delaware Tribe of Indians."

et seq., 25 U.S.C. 1181-1186, Congress ordered the Secretary of the Interior to distribute funds previously appropriated to satisfy the judgment to the following (25 U.S.C. 1181; J.S. App. 92a):

> (a) Indians whose "name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906";[6]
>
> (b) Indians whose "name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior";[7] or
>
> (c) Indians who "are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary."

Thus, the Cherokee Delawares (through the first provision), the Absentee Delawares (through the second provision), and the Kansas "Delawares" (through

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[6] The 1906 payroll was compiled for the purpose of distributing $150,000 appropriated by Congress in settlement of a number of lawsuits brought by the Cherokee Delawares against the United States. See Act of April 21, 1904, 33 Stat. 189, 222. (J.S. App. 14a, n. 15.)

[7] The 1940 census roll is used by the Absentee Delawares as the basis for determining tribal membership pursuant to a 1956 resolution of the Absentee Delaware Tribe (J.S. App. 14a, n. 15).

the third, or "catchall," provision) were eligible to participate in this distribution.

In 1950 and 1951, the Absentee and Cherokee Delawares also brought separate but identical suits in the Indian Claims Commission for an accounting under the 1854 Treaty relating to the sale of the "trust lands" in 1856 and 1857. After determining that both groups were entitled jointly to represent the Delaware Tribe, the Commission concluded that the "trust lands" had not been sold at public auction, contrary to the terms of the treaty, and that the Delawares received $1,385,617.81 less than they were entitled to for the land; accordingly, the Commission awarded the Delawares $9,168,171.13, which included interest from 1857 to 1969. 21 Ind. Cl. Comm. 344, 366-369. Three years later, in the Act of October 3, 1972, 86 Stat. 762 *et seq.*, 25 U.S.C. (Supp. IV) 1291-1297, Congress adopted a distribution plan for payment of this judgment that differed from the distribution set forth in 25 U.S.C. 1181-1186: ten percent of the award was to be paid directly to the Cherokee and Absentee Delaware Tribes for uses approved by the Secretary of the Interior, while the remaining ninety percent was to be divided among individuals in categories (a) and (b) above. See 25 U.S.C. (Supp. IV) 1292. Thus, since the "catchall" provision (c) was not included in this distribution statute, the Kansas "Delawares" were not permitted to share in the second award (J.S. App. 15a-17a).

By March 1974, the Bureau of Indian Affairs had approved 9,573 Indians to share in the $9,168,171.13

award. Of these, 7,765 were Cherokee Delawares and 1,808 were Absentee Delawares (J.S. 39a, n. 36).[8]

3. On August 28, 1973, Wanda June Weeks, on behalf of herself and the Kansas "Delawares," [9] instituted an action in the United States District Court for the Western District of Oklahoma against the Secretary of the Interior and the Cherokee and Absentee Delawares to challenge the constitutionality of the distribution statutes, 25 U.S.C. 1181-1186 and 25 U.S.C. (Supp. IV) 1291-1297 (App. 6-16, 21-25). Her amended complaint alleged that 25 U.S.C. (Supp. IV) 1292 violated the Due Process Clause of the Fifth Amendment by excluding the Kansas "Delawares" from sharing in the moneys appropriated to satisfy the second Indian Claims Commission judgment. She also challenged the inclusion of the Cherokee and Absentee Delawares in the distribution provisions of 25 U.S.C. (Supp. IV) 1291-1297.

On September 20, 1973, Dorothy Frazier and Ruth Rattler brought a similar action against the Secretary of the Interior [10] in the United States District Court for the Northern District of Oklahoma on behalf of the descendants of a certain member of the Delaware Tribe in 1854, who were not eligible to take under the

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[8] The Secretary's regulations concerning this distribution are contained in 25 C.F.R. Part 43j.

[9] Plaintiff Weeks informed the court that she had identified 678 living descendants of the Indians who left the tribe in 1866 (J.S. App. 3a-4a, n. 3).

[10] The Cherokee Delawares and Absentee Delaware Tribes later intervened in this action as defendants.

1906 or 1940 rolls. The complaint sought the inclusion of the plaintiff class in the distribution under 25 U.S.C. (Supp. IV) 1291-1297 or a declaration of that statute's unconstitutionality as a denial of equal protection of the law.

On April 22, 1974, the actions were consolidated in the Western District of Oklahoma [11] and a three-judge district court was convened under 28 U.S.C. 2282.[12] The court, with one judge dissenting, agreed with the plaintiffs that 25 U.S.C. (Supp. IV) 1291-1297 violated due process by arbitrarily deleting the Kansas "Delawares," whose ancestors were among the Indians injured by the government's breach of the 1854 Treaty, from the class of persons entitled to share in the second distribution. Although the court majority conceded that the challenged statute involved no "suspect classification" or "fundamental interest," it concluded that the exclusion of the Kansas "Delawares" from the distribution provisions had no rational basis (J.S. App. 29a, 35a-51a). Therefore, the court declared the statute unconstitutional and enjoined the Secretary from distributing the funds appropriated thereunder. The court rejected the attack

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[11] One month earlier that court had issued a preliminary injunction preventing the Secretary from distributing any funds under the challenged statutes (App. 2).

[12] On August 2, 1974, the parties in the *Frazier-Rattler* case agreed to rely on and adopt the arguments made in the *Weeks* case.

on 25 U.S.C. 1181-1186 and denied all other relief requested by the appellees (J.S. App. 64a).[13]

INTRODUCTION AND SUMMARY OF ARGUMENT

Few subjects addressed by this Court have received such long-standing and consistent recognition as the plenary power of Congress over the property of Indian tribes. More than a half-century ago, Mr. Justice Brandeis wrote for a unanimous Court that, "as regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare." *Morrison* v. *Work*, 266 U.S. 481, 485. Equally well-settled is that whatever title Indians have in tribal property is in the tribe, and not in its individual members, *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307, and that the federal government may determine membership in the tribe for the purpose of adjusting rights in tribal property. *Sizemore* v. *Brady*, 235 U.S. 441, 447; *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 488.

The issue presented by this case is whether Congress exceeded these broad powers and violated the Due Process Clause of the Fifth Amendment by distributing tribal property of the Delaware Indians—specifically, funds appropriated to satisfy an Indian Claims Commission judgment that the government

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[13] The Kansas "Delawares" have sought review of this portion of the district court's judgment in No. 75-1328.

had breached an 1854 treaty with the tribe—to members of the two modern successors of the tribe, while excluding from the distribution descendants of Delaware Indians who severed their relations from the tribe more than a century ago. The district court's conclusions that the distribution statute effected an unconstitutional discrimination can be sustained only by departing from the heretofore unquestioned principles outlined above.

By rejecting the decision of Congress to distribute the judgment of the Indian Claims Commission to tribal members, and by interpreting the Due Process Clause to require, in essence, a *per capita* distribution of the judgment to all lineal descendants of members of the Delaware Tribe at the time of the alleged wrong, the decision of the district court deprives Congress of its discretion to determine the most beneficial method of allocating tribal property; it calls into question the validity of similar federal legislation; and it threatens to impose a severe administrative burden on the Secretary.

To the extent the Due Process Clause reflects equal protection principles (see *Schlesinger* v. *Ballard*, 419 U.S. 498, 500, n. 3) it prevents Congress only from making distinctions that are "patently arbitrary" and "utterly lacking in rational justification." *Weinberger* v. *Salfi*, 422 U.S. 749, 768, quoting from *Flemming* v. *Nestor*, 363 U.S. 603, 611. See also *Perrin* v. *United States*, 232 U.S. 478, 486.

The most apparent rational basis for the statute at issue lies in the fact that those excluded—the Kansas

"Delawares"—are descendants of Indians who severed their relationship with the tribe a century ago, became citizens, and by treaty agreed they had no further rights to any tribal property. That in itself justified Congress' decision not to make them eligible for the tribal property involved here—the funds appropriated to satisfy the Commission's 1969 judgment.

Moreover, in view of the historic relationship between the federal government and the Indian tribes and the fact that tribal rather than individual property was being distributed, Congress' determination to favor tribal Indians in the allocation of tribal funds has a rational basis that is readily apparent. Indeed, similar legislative distinctions have repeatedly been upheld by this Court; indeed, as the Court recognized in *Morton* v. *Mancari*, 417 U.S. 535, 552, literally every piece of legislation dealing with Indian tribes singles out tribal Indians for special treatment.

ARGUMENT

25 U.S.C. (Supp. IV) 1291-1297 Is A Proper Exercise Of Congress' Constitutional Power Over Indian Tribal Property

A. *Congress Has Plenary Power Under The Constitution To Manage And Distribute The Property And Funds Of Indian Tribes*

The statute at issue, 25 U.S.C. (Supp. IV) 1291-1297, is a statute that prescribes how tribal property, not individually owned property, shall be distributed. The property resulted from the claim prosecuted in

the Indian Claims Commission for nearly twenty years by the Cherokee Delawares and the Absentee Delawares, who jointly represented the Delaware Tribe of Indians. 21 Ind. Cl. Comm. 344, 345. The claim related to the sale of tribal land under a treaty. The tribal entity owned this claim to the extent it was subject to ownership by anyone.[14] The United States entered into treaties with Indian tribes, not with individual tribal members, and the promises it made in those treaties were promises to the tribes. *The Sac and Fox Indians*, 220 U.S. 481, 484.

In this case, after the Commission rendered its decision against the United States in 1969 (21 Ind. Cl. Comm. at 369-370), Congress appropriated the money needed to satisfy the judgment, although it was under no legally-enforceable obligation to do so.[15]

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[14] See the opinion of the district court (J.S. App. 40a), quoting *Turtle Mountain Band of Chippewa Indians* v. *United States*, 490 F. 2d 935, 954 (Ct.Cl.) ("the ancestral group 'owns' the claim, and present-day Indian groups are before the Commission only on behalf of the ancestral entity").

[15] Congress was under no obligation to establish the Indian Claims Commission. See *United States* v. *Tillamooks*, 329 U.S. 40, 54-55 (Black, J., concurring).

The report of the Commission, when filed with Congress, has the same effect as a final judgment of the Court of Claims. 25 U.S.C. 70u. See also the Conference Report on the bill that became the Indian Claims Commission Act, 60 Stat. 1049 *et seq.* (25 U.S.C. 70-70v), H.R. Rep. No. 2693, 79th Cong., 2d Sess. 8 (1946).

Congress has discretion to decide whether to pay such judgments; usually it decides to do so. *Glidden Company* v. *Zdanok*, 370 U.S. 530, 570 (opinion of Harlan, J.). Congress' "decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government." *United States* v. *Realty*

The funds appropriated to satisfy the judgment of the Indian Claims Commission also constituted tribal property in which no individual had vested rights, and the district court did not hold otherwise (J.S. App. 40a, 49a). It was the Delaware Tribe that suffered from the government's breach of the 1854 Treaty, and it was the tribal entity that the judgment of the Indian Claims Commission and the monies appropriated by Congress were designed to compensate.[16]

Once the Commission and the courts determined the extent of the wrong and the identity of the injured tribal body, the precise terms of distribution of the award, including the specific tribal entities or individuals entitled to share in the tribal fund, were matters within the the exclusive province of Congress. The Court of Claims recently stated the guiding proposition in *Turtle Mountain Band of Chippewa Indians* v. *United States*, 490 F. 2d 935, 951 (citations omitted):

> The [Indian Claims] Commission must determine which identifiable group of Indians was wronged. In so doing, it must allow all interested parties to participate. * * * But when it comes to frame an award, it must not overstep its proper function by the way in which it denominates the wronged entity. Certain questions,

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Company, 163 U.S. 427, 444. See generally Schwartz and Jacoby, *Government Litigation* 160-164 (1963).

[16] Indeed, the Indian Claims Commission is empowered only to adjudicate claims held by tribal entities rather than by individual Indians. 25 U.S.C. 70a, 70i. See *Minnesota Chippewa Tribe* v. *United States*, 315 F. 2d 906, 914 (Ct. Cl.).

> such as "whether specific individuals, classes of persons, or subgroups saying that they are members or components of the prevailing group are entitled to participate in the judgment," * * * are for Congress or authorized administrative bodies, and not for resolution by the Commission or by this court.

See also *Cherokee Freedmen*, 195 Ct. Cl. 39, 46 & n. 4, 51-52; *Snoqualmie Tribe of Indians* v. *United States*, 372 F. 2d 951, 957 (Ct. Cl.); *Red Lake & Pembina Bands* v. *Turtle Mt. Band of Chippewa Ind.*, 355 F. 2d 936, 943-944 (Ct. Cl.); *Minnesota Chippewa Tribe* v. *United States, supra*, 315 F. 2d at 913-914 & n. 11; see also *McCalib, Admr.* v. *United States*, 83 Ct. Cl. 79, 85.

In directing the distribution of this tribal property pursuant to the statute attacked by the Kansas "Delawares," Congress exercised its traditionally broad authority over the management and distribution of lands and property held by recognized Indian tribes, an authority derived from Congress' express constitutional power "[t]o regulate Commerce * * * with the Indian Tribes" (Article I, Section 8).[17] This control by Congress of tribal assets has been termed "one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs * * *," Cohen, *Handbook of Federal Indian Law* 94 (1942), and the contention

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[17] The treaty-making power (Article II, Section 2, cl. 2) is also a source of federal authority over Indian matters. *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 n. 7; *Worcester* v. *Georgia*, 6 Pet. 515, 559 (Marshall, C.J.).

that Congress may have exceeded its constitutional powers in dealing with tribal assets "is one that has often been made in this court and rejected as often as made." *Chase, Jr.* v. *United States*, 256 U.S. 1, 7. See also *Bryan* v. *Itasca County*, No. 75-5027, decided June 14, 1976, slip op. 2, n. 2; *Board of Commissioners* v. *Seber*, 318 U.S. 705, 715-718; *Winton* v. *Amos*, 255 U.S. 373, 391; *Williams* v. *Johnson*, 239 U.S. 414, 420; *Sizemore* v. *Brady*, *supra*, 235 U.S. at 449; *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 311.

Embraced within this pervasive congressional authority over tribal property is the power to allocate tribal assets in the manner perceived by Congress to be most beneficial to the affected tribe and to realize most effectively the other goals of the historic guardian-ward relationship. In *Sizemore* v. *Brady*, *supra*, for example, the Court, in sweeping language whose validity has never been doubted, upheld the congressional determination to amend acts granting allotments of tribal lands and money to individual Indians, stating (235 U.S. at 449):

> The lands and funds to which [the allotment statute] related were tribal property and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians.

> And without doubt it could confine the allotment and distribution to living members of the tribe or make any provision deemed more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be entitled, if living.

The Court has never departed from the principle, recognized in *Sizemore*, that it is for Congress to determine what is the most beneficial manner of dealing with tribal property. Thus, Congress may choose to differentiate between groups of Indians in the same tribe in making a distribution, *Simmons* v. *Eagle Seelatsee*, 384 U.S. 209, affirming 244 F. Supp. 808 (E.D. Wash.), to expand a class of tribal beneficiaries entitled to share in royalties from tribal lands, *United States* v. *Jim*, 409 U.S. 80; *Gritts* v. *Fisher*, 224 U.S. 640, 648, or to devote to tribal use mineral rights under allotments that otherwise would have gone to individual allottees, *Northern Cheyenne Tribe* v. *Hollowbreast*, No. 75-145, decided May 19, 1976. Furthermore, Congress has authority, which it has exercised on occasion, to determine membership in an Indian tribe for purposes of distributing tribal property. Cohen, *Handbook of Federal Indian Law*, *supra*, at 98. See *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 488; *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307.

Because title to tribal property and funds rests solely in the tribe rather than in its individual members and because tribal members have no vested interest in tribal assets that may not be abrogated or impaired by Congress acting in its guardianship

status,[18] the courts consistently have granted wide latitude to Congress in deciding what is the best or most efficient use to which tribal lands or funds should be devoted. Indeed, we know of no instance in which the Court has failed to sustain a legislative determination regarding the use of tribal property for the benefit of the tribe.

This is not because Congress' judgment on these matters has always been correct, nor is it because the judiciary has always agreed with the congressional determination. As we have discussed, "the plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Morton* v. *Mancari*, 417 U.S. 535, 551-552. Thus, once a court finds that the legislation "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," *id.* at 555, the judicial inquiry is at an end.[19]

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[18] See, *e.g.*, *Stephens* v. *Cherokee Nation*, *supra*, 174 U.S. at 488: "The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

[19] This obviously does not mean that all federal legislation concerning Indians is therefore immune from judicial scrutiny or that claims, such as those presented by respondents, are not justiciable. Congress has plenary authority to legislate with respect to tribal property but such power does "not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.' " *United States* v. *Creek Nation*, 295 U.S. 103, 110; see also *United States* v. *Tillamooks*, *supra*, 329

To go further not only is to ignore two centuries of precedent but also is to invade an area reserved under the Constitution to Congress.[20] This we submit is what the district court majority did.

Although the district court acknowledged that the Kansas "Delawares" had severed their relations with the tribe and become fully emancipated American citizens in 1866, it thought that this was insufficient to justify Congress' failure to allow them to share in the award because Article IX of the Treaty of 1866 "expressly provided that any Delaware electing to become a citizen would receive * * * his 'just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States' " (J.S. App. 45a). In the court's view, participation in the distribution by the Kansas "Delawares" was therefore mandatory: "[h]ad the United States fulfilled its obligations in good faith under the 1854 Treaty, the Kansas Delawares on electing citizenship would each have received their just proportion of the increased proceeds of the land sales in 1856 and 1857" and the Indian Claims

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U.S. at 54; Cohen, *Handbook of Federal Indian Law, supra*, at 96; cf. *United States* v. *Jim, supra*, 409 U.S. at 82 n.3.

[20] Moreover, Article 8 of the 1854 Treaty provides (J.S. App. 102a):

> Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said [trust] lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper.

Commission award "was clearly intended to redress the injury and diminution of proceeds from those sales" (*ibid.*).

This holding misperceives the purpose of an Indian Claims Commission judgment, which is not to "make whole" any individual tribal member or group of Indians, but rather to correct an unconscionable injustice to the historic tribe. The *legal* questions whether and to what extent an Indian tribe has been wronged by the federal government—questions that are within the expertise of the Indian Claims Commission and the courts—are wholly distinct from the legislative *policy* decision of how best to apportion the tribal award among the competing interests. By ruling that the Due Process Clause deprived Congress of any discretion to exclude the Kansas "Delawares" from participation in the award because, in some quasi common-law contract sense, that group stands on an "equal footing" (J.S. App. 29a) with the Cherokee and Absentee Delawares, the court below has resurrected the concept of "vested rights" of individual Indians in tribal property—a concept that has consistently been rejected by this Court (*e.g.*, *United States* v. *Jim*, 403 U.S. 80)—and in essence has abrogated the statutory requirement that claims under the Indian Claims Commission Act be presented on behalf of the tribal entity rather than by individuals. See p. 15 n. 16, *supra*.[21]

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[21] If the federal government had honored its obligations under the 1854 Treaty by selling the trust lands at public auction, additional revenues doubtless would have accrued to

The logical extension of the constitutional stricture imposed by the district court is the requirement, as a matter of due process, that judgment funds be distributed *per capita* to *all* lineal descendants of members of an Indian tribe at the time of the alleged wrong.[22] Such a rule would render meaningless the repeated judicial pronouncement that the questions "whether specific individuals, classes of people, or subgroups saying that they are members or components of the prevailing group are entitled to participate in [an Indian Claims Commission] judgment * * * are reserved for Congress or for author-

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the tribe, but that revenue would have been tribal property to which no individual rights would have attached until it had been distributed. *United States* v. *Jim*, *supra*, 409 U.S. at 82-83; *United States* v. *Rowell*, 243 U.S. 464, 468-469. Whether or not the ancestors of the Kansas "Delawares" might have received a larger proportionate distribution when they severed relations with the tribe, they certainly obtained no rights enforceable a century later.

[22] At least the district court appeared to assume that such a *per capita* distribution to each lineal descendant would result in the due process it found lacking in the present statute (J.S. App. 49a-50a). One might ask, however, whether the absolute equality the court thought necessary would be achieved by such a statute. Would it not be "more equal" to distribute to the descendants of the Kansas "Delawares" only that percentage of the award equal to the proportion of the tribe represented by their ancestors in 1866 when they left—a sort of *per stirpes* distribution analogous to the method of dividing an intestate estate? One might also ask whether 1866 is the proper year to focus upon or whether it should be when the wrong occurred (in this case 1856 and 1857). Until the decision below, these have been questions for Congress alone to decide.

ized administrative resolution when the award is paid." *Cherokee Freedmen, supra*, 195 Ct. Cl. at 46. Moreover, it would impose a massive and unyielding administrative burden on the Secretary to undertake individualized adjudications of descendancy from tribal members in the distant past. Still further, such a rule would raise serious questions concerning the validity of a host of past and present distribution statutes that have authorized payments to Indians who are either on, or descended from persons on, specified tribal rolls, without providing express "catch-all" coverage for all descendants of members of the tribe on the exact date of injury.[23]

B. *The Statute Distributing Delaware Indian Tribal Funds To The Modern Successors Of That Tribe And To Their Members Does Not Violate The Due Process Clause*[24]

While we believe the foregoing demonstrates the constitutionality of 25 U.S.C. (Supp. IV) 1291-1297,

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[23] Congress has distributed judgment funds to enrolled members of the modern tribe, or to members eligible for enrollment in the tribe, in the following statutes: 25 U.S.C. 565-565(g) (Klamaths); 25 U.S.C. (Supp. IV) 581-590c (Shoshone); 25 U.S.C. (1970 ed. and Supp. IV) 1071-1073 (Confederated Colville); 25 U.S.C. (1970 ed. and Supp. IV) 1161-1163 (Cheyenne-Arapaho); 25 U.S.C. 1191-1195 (Confederated Umatilla); 25 U.S.C. (Supp. IV) 1261-1265 (Blackfeet and Gros Ventre); 25 U.S.C. (Supp. IV) 1300b-1300b-5 (Kickapoo); 25 U.S.C. (Supp. IV) 1300c-1300c-5 (Yankton Sioux); 25 U.S.C. (Supp. IV) 1300e-1300e-7 (Assiniboine Tribes of Montana).

[24] In the Court's order noting probable jurisdiction in No. 75-1335, the parties were requested to discuss whether the

the statute in any event satisfies the requirements of the Due Process Clause even if it is analyzed without regard to Congress' plenary authority over tribal property. In light of its historic relationship with federally-recognized Indian tribes, Congress clearly was justified in favoring the Cherokee and Absentee Delaware tribes in the allocation of tribal assets over the descendants of Delaware Indians who ended their tribal membership and took their proportionate share of tribal property more than a century ago.

Distinctions drawn by Congress that do not implicate fundamental constitutional interests or rest upon

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tribal entities involved in this case are indispensable parties, in whose absence the suit should have been dismissed. The doctrine that Indian tribes may not be sued without their consent or the consent of Congress is firmly established. *United States* v. *U.S. Fidelity Co.*, 309 U.S. 506, 512; *Turner* v. *United States*, 248 U.S. 354, 358. Equally well settled is that this principle of quasi-sovereign immunity may not be evaded by bringing suit against tribal officers as representatives of the tribe (see, *e.g.*, *Seneca Constitutional Rights Organization* v. *George*, 348 F. Supp. 48, 50 (W.D.N.Y.); *Barnes* v. *United States*, 205 F. Supp. 97, 100 (D. Mont.)) or against the Secretary of the Interior as guardian of the tribe or trustee of its assets (see, *e.g.*, *Tewa Tesuque* v. *Morton*, 498 F. 2d 240 (C.A. 10), certiorari denied, 420 U.S. 962; *Lomayaktewa* v. *Hathaway*, 520 F. 2d 1324 (C.A. 9), certiorari denied *sub nom. Susenkewa* v. *Kleppe*, No. 75-844, March 29, 1976).

Whether an Indian tribe has been joined in disregard of these principles or has not been made a party in violation of Rule 19, Fed.R.Civ.P., are questions that, in our view, are not presented here, since the Absentee and Cherokee Delawares voluntarily intervened in *Frazier, et al.* v. *Morton*, W.D. Okla., Civ. 74-368-D, one of the consolidated cases presently under review. See pp. 9-10 and n.10, *supra*.

suspect classifications do not violate principles of equal protection embodied in the Due Process Clause unless they are "patently arbitrary," "utterly lacking in rational justification." *Weinberger* v. *Salfi*, 422 U.S. 749, 768, quoting from *Flemming* v. *Nestor*, 363 U.S. 603, 611. See also *Mathews* v. *Lucas*, No. 75-88, decided June 29, 1976; *Richardson* v. *Belcher*, 404 U.S. 78, 81-84. The statute in issue should be sustained under that test.

1. There is a quite "rational justification" for Congress' failure to make the Kansas "Delawares" eligible to receive the funds appropriated to satisfy the judgment in favor of the Delaware Tribe. The Kansas "Delawares," as a class, do not claim to be members of that tribe or any other. Pursuant to the 1866 Treaty,[25] they severed their relationship with the tribe and became United States citizens. Article IX of that Treaty, which is set forth in the margin,[26] provides that "such persons"—that is, appellees' ancestors—"shall cease to be members of the Delaware

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[25] 14 Stat. 793.

[26] The last sentence of Article IX provides:

> There shall be granted to each of the Delawares who have thus become citizens, a patent in fee simple for the lands heretofore allotted to them, and, if they do not remove with the nation, their pro rata share of all annuities and trust property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

tribe, and shall not further participate in their councils, nor share in their property or annuities." On this ground alone, Congress had a rational basis for excluding the Kansas "Delawares": the funds appropriated to satisfy the judgment of the Indian Claims Commission are tribal funds (see pp. 13-15, *supra*) and the Kansas "Delawares," their ancestors having left the tribe, were not entitled to share in them.

The district court, however, thought that Article IX should not be interpreted to mean that the Kansas "Delawares" had no "rights to share in such a future award as is involved here" (J.S. App. 45a). In support, the court quoted the following passage from *Choate* v. *Trapp*, 224 U.S. 665, 675: "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."

Far from supporting the court's view, this venerable rule of construction is firmly against the court's interpretation. While the rule is that doubtful expressions are not to be "resolved in favor of the United States," this has little relevance here: excluding the Kansas "Delawares" from sharing in the award does not affect the total amount appropriated by Congress; including them would not require Congress to appropriate more money. The question here deals not with the size of the award but how it should be divided. More important is the rule's admonition that doubtful expressions are to be resolved in favor

of those who "are wards of the nation." That means the interpretation should be in favor of the Absentee Delaware tribe and the Cherokee Delaware tribe,[27] not the Kansas "Delawares," whose ancestors ceased being wards of the Nation more than a century ago when they left the tribe.[28] See *Eastern Band of Cherokee Indians* v. *United States*, 117 U.S. 288, 311-312.

The statute at issue is thus rationally justified for the quite apparent reason that, in distributing tribal funds that Congress created by appropriation to satisfy a 1969 judgment, it simply excludes those whose ancestors relinquished any interest in tribal property.[29]

Moreover, it is significant that the exclusion of the Kansas "Delawares" from the distribution authorized by 25 U.S.C. (Supp. IV) 1291-1297, was not without precedent. On April 21, 1904, Congress ap-

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[27] See note 32, *infra*.

[28] Cf. *Northern Cheyenne Tribe* v. *Hollowbreast*, No. 75-145, decided May 19, 1976, slip op. 6-7 n. 7 ("The court also relied on the canon that 'statutes passed for the benefit of the Indians are to be liberally construed and all doubts are to be resolved in their favor.' * * * But this eminently sound and vital canon has no application here; the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members.").

[29] Appellees, citing the Act of March 3, 1875, 18 Stat. 410, 420, 43 U.S.C. 189, argue that any rights given up when their ancestors left the tribe have been restored (Motion to Dismiss in No. 75-1301, at p. 7). But the statute cited applies to Indians who gave up their tribal relations to settle under federal homestead laws, which appellees' ancestors did not (Cohen, *Handbook of Federal Indian Law*, *supra*, at 186); and, in any event, it conferred no rights upon the descendants of such Indians. *Oakes* v. *United States*, 172 Fed. 305, 309-310 (C.A. 8); cf. *Halbert* v. *United States*, 283 U.S. 753, 762-763.

propriated $150,000 to settle various claims against the United States by the "Delaware Tribe of Indians," including the so-called "outlet" lands that had been ceded to the federal government under the 1854 Treaty. See *United States* v. *Delaware Tribe of Indians*, 427 F. 2d 1218, 1229-1230 (Ct. Cl.). The appropriations act directed the Secretary of the Treasury to pay the settlement fund to the Delaware Tribe, "as said tribe shall in council direct" (33 Stat. 189, 222). Then, as now, some of the Kansas "Delawares" sought to participate in the distribution, but were excluded, as the district court acknowledged (J.S. App. 14a, n. 15), "on grounds similar to some of those argued in the present case." See Resolution of the Delaware Council, April 29, 1904 (A. 90-95); Letter to the Secretary of the Interior from the Delaware Indians, January 25, 1905 (A. 96-97); and Letter to the U.S. Indian Agent from the Commissioner of Indian Affairs, March 22, 1905 (A. 98-100). Indeed, after surveying the historical evidence the Comptroller of the Treasury concluded that "[m]anifestly [the Kansas "Delawares"] were not entitled to participate in the distribution of annuities or other funds due or belonging to the Delaware tribe," and observed (11 Decisions of the Comptroller of the Treasury 496, 500, emphasis in original):

> The provision in the act of April 21, 1904, *supra*, authorizes and directs payment to the "Delaware *tribe* of Indians residing in the Cherokee Nation, as said *tribe* shall in council direct," in the sum of $150,000 in full [sic] of all claims and demands of "said tribe" against the United

States. The proviso immediately following the appropriation in the act emphasizes the clear indication that the appropriation was made for the tribe as distinguished from the Delaware Indians who had severed their tribal relations and become citizens of the United States.

2. Even aside from this provision in the 1866 Treaty, by allocating ten percent of the funds appropriated to pay the judgment of the Indian Claims Commission to the Cherokee and Absentee Delaware tribal entities for tribal purposes (25 U.S.C. (Supp. IV) 1294), while distributing the remaining ninety percent to the persons whose names, or the names of whose lineal ancestors, appear on designated tribal rolls (25 U.S.C. (Supp. IV) 1292), Congress rationally acted to further the legitimate legislative objective of mitigating the hardship to Indians who belong to federally-recognized tribes. No extensive discussion is required to demonstrate the wisdom of that result. Laws granting preferences to tribes and tribal Indians, including the award of benefits to tribal entities and their members that are not made available to persons who may ethnically be of Indian blood but who are not a part of a federally-recognized tribe, have long been sustained by this Court as a proper exercise of the constitutional power of Congress "[t]o regulate Commerce * * * with the Indian tribes." This Court and Congress have recognized time and again that in depriving the Indian tribes of most of their land and of their traditional ways of supporting themselves, the federal government assumed spe-

cial responsibilities toward them—responsibilities that have correctly been described from virtually the beginning of our Nation as resembling the duties of a guardian to a ward. *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17; *United States* v. *Kagama*, 118 U.S. 375, 383-384.[30]

In light of this and the unique history of federal relations with the Indian tribes, Congress repeatedly has favored tribal members in ways that might not be appropriate with respect to other groups. This Court has noted that literally every piece of legislation dealing with Indian tribes singles out tribal Indians for special treatment. *Morton* v. *Mancari*, *supra*, 417 U.S. at 552. In recent cases, for example, the Court has sustained legislation granting tribal Indians welfare benefits (*Morton* v. *Ruiz*, 415 U.S. 199) and hiring preferences within the Bureau of Indian Affairs (*Morton* v. *Mancari*, *supra*); the

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[30] The guardianship principle and the powers concomitant with it were set forth by the Court in *Board of Commissioners* v. *Seber*, 318 U.S. 705, 715, which upheld against constitutional attack a federal tax immunity granted tribal Indians on land purchased with trust funds:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.

Court has indicated that other, similar statutory preferences through which Congress has sought to fulfill its obligation toward the Indians will not be disturbed. *Morton* v. *Mancari*, *supra*, 417 U.S. at 555; *Moe* v. *Salish & Kootenai Tribes*, No. 74-1656, decided April 27, 1976, slip op. 16.[31]

This accepted congressional power to favor tribal Indians in the dispensation of a variety of public benefits provides still further support for the rationality of the system established by Congress in 25 U.S.C. (Supp. IV) 1291-1297 for the allocation of property *belonging to the tribe*. The funds appropriated to compensate the Delaware Tribe for breach of the 1854 Treaty, as we have emphasized (see p. 15, *supra*), are tribal property and it is clear that "the right to each individual [Indian] to participate in the enjoyment of such property depend[s] upon tribal membership, and when that [is] terminated by death or otherwise the right [is] at an end." *Sizemore* v. *Brady*, *supra*, 235 U.S. at 446-447. See also *Halbert* v. *United States*, 283 U.S. 753, 762-763. Thus, Indians such as the Kansas "Delawares," whose ancestors renounced their tribal membership and separated from the tribe, traditionally have not been entitled to share in the tribal assets. *Eastern Band of Cherokee Indians* v. *United States*, 117 U.S.

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[31] The Court has emphasized, however, that the preferences apply only to members of federally-recognized tribes and that the determination of who are tribal Indians for these purposes is not fixed by lines of descendancy or race (*Morton* v. *Mancari*, *supra*, 417 U.S. at 553 n. 24).

288; *Miami Tribe of Oklahoma* v. *United States*, 281 F. 2d 202, 213 (Ct. Cl.), certiorari denied, 366 U.S. 924. The distribution statute reflects this rational distinction between Indians who presently are members of federally-recognized tribes and those whose only connection with the tribe is historical.[32] Congress properly concluded that different treatment was warranted for each class."[33]

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[32] Although the Kansas "Delawares" do not dispute that the Absentee Delawares are a federally-recognized tribe (see J.S. 20, No. 75-1328), they contend that the Cherokee Delawares are not federally recognized and that Congress may not prefer its members over non-tribal individuals of Indian blood (Mot. to Dismiss or Aff. 4, 7-9). But Congress has repeatedly recognized the Cherokee Delaware Tribe, both by treaty prior to the tribe's moving to Oklahoma and by statute thereafter. See, *e.g.*, the "Resolution Establishing by-laws Under Which the Delaware Tribal Business Committee Shall Speak and Act in Behalf of the Delaware Tribe of Indians" (A. 101-106), which was adopted on September 7, 1958, by the Delaware Tribal Business Committee and was approved by the Commissioner of the Bureau of Indian Affairs on May 31, 1962 (Answer 50 to interrogatories to the Secretary of the Interior, with attachments). See also the Act of April 21, 1904, 33 Stat. 189, 222, which provided for payments to "the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct * * *"; the Act of February 7, 1925, 43 Stat. 812, which permitted claims to be brought in the Court of Claims by the "Delaware Tribe of Indians residing in Oklahoma;" and the Act of March 3, 1927, 44 Stat. 1358, and the Act of June 4, 1936, 49 Stat. 1459, which amended the 1925 statute.

[33] The district court (J.S. App. 25a & n. 23) and the Kansas "Delawares" (Mot. to Dismiss or Aff. 13, 15; Mot. to Dismiss 5, No. 75-1301) apparently conceded that a statute distributing all, rather than merely ten percent, of the appropriated funds to the Absentee and Cherokee Delaware tribes would have

Appellees contend, however, that the Cherokee and Absentee Delawares may not be favored by federal

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raised no constitutional problems. We fail to comprehend why the alternative means of distribution employed by Congress constitute impermissible discrimination against the Kansas "Delaware" class. The result of either method of allocation would be identical: the Absentee and Cherokee Delaware tribes, and their members, would receive the full benefit of the award, while the Kansas "Delawares" would be eliminated from any share of the fund. Indeed, we can perceive no constitutional infirmity if, upon receiving the complete award, the tribes would then have voted to distribute a portion of the monies to their individual tribal members, thus achieving the same result presently mandated by 25 U.S.C. (Supp. IV) 1291-1297. See *Prairie Band of Pottawatomie Tribe of Indians* v. *Puckkee*, 321 F. 2d 767 (C.A. 10); *Prairie Band of Pottawatomie Tribe of Indians* v. *Udall*, 355 F. 2d 364 (C.A. 10), certiorari denied, 385 U.S. 831.

Moreover, the form of the distribution statute indicates that Congress did intend to award the entire judgment to the modern successors of the Delaware Tribe, with the proviso that the tribes must in turn allocate the bulk of their portion to certain designated members. Section 1294(a) provides that "[t]he Secretary of the Interior shall apportion *to the Absentee Delaware Tribe of Western Oklahoma, as presently constituted*, so much of the judgment fund and accrued interest as the ratio of the persons enrolled pursuant to section 1292 (c) (2) of this title bears to the total number of persons enrolled pursuant to section 1292 of this title," and Section 1294 (b) similarly provides that "[t]he funds not apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed *to the credit of the* [*Cherokee Delawares*] in the United States Treasury * * *" (emphasis added). Compare, *e.g.*, the distribution authorized by 25 U.S.C. 1183, which requires the judgment fund relating to the Indiana lands taken from the Delawares in 1818 to be allocated directly among the individual Indians whose names appear on the rolls prepared in accordance with Section 1181, rather than indirectly through the tribes or other entities.

legislation because they have no formal reservation (Motion to Dismiss or Aff. 7-9). But the important question is not whether some members of the tribes may live outside of a formal tribal community; it is whether the federal government has acknowledged a responsibility toward these people as a group, through recognition of their tribe. Even Indian tribes possessing reservations often live in a community of non-Indians, particular since much reservation land was long ago sold out of Indian ownership in order to encourage interaction among the races. See, *e.g.*, *Mattz* v. *Arnett*, 412 U.S. 481, 496. Because of the unique history of Oklahoma, there are presently few, if any, of the type of Indian reservations found in other states (see *Morton* v. *Ruiz*, 415 U.S. 199, 212, 218-219); nevertheless, tribal Indians in that area are accorded the preferential treatment given reservation Indians elsewhere.[34]

Nor can the district court's conclusions be supported on the ground that the distribution statute does not correspond precisely to the current membership criteria of the Cherokee or Absentee Delaware tribes. For example, as the Kansas "Delawares" (Motion to Dismiss 4, No. 75-1301) and the court below (J.S. App. 48a, n. 40) have observed, membership in the Absentee Delaware Tribe is limited to persons of one-eighth Delaware blood, whereas Section 1292(c)(2)

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[34] See Hearings on H.R. 5200 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 92d Cong., 2d Sess. 81-82 (March 13, 1972) (hereinafter referred to as "Hearings").

contains no such condition upon the receipt of tribal funds. Similarly, Indians whose name, or name of whose lineal ancestors, is on (or, in the case of the Absentee Delawares, is eligible to be on) certain designated tribal rolls are entitled to share in the distribution even though they may have withdrawn from the tribe. This, however, scarcely demonstrates any irrationality in the method Congress has chosen to distribute the Delaware tribal funds.

The contention that some recipients of judgment funds may no longer be tribal members ignores the settled power of Congress to specify which persons bearing a reasonable relationship to the tribe may be treated as tribal members for purposes of the allocation of tribal property in a beneficial manner. *Sizemore* v. *Brady*, *supra*, 235 U.S. at 447; *Stephens* v. *Cherokee Nation*, *supra*, 174 U.S. at 488; Cohen, *Handbook of Federal Indian Law*, *supra*, at 98-99. Certainly, those Indians who are able to satisfy the statutory requisites will bear a sufficiently close relationship to the Delaware tribe for their inclusion to be proper.

More important, the fact that Congress may have adopted a bright-line standard that in isolated cases is over-inclusive in terms of the statutory objective is hardly significant so far as the Constitution is concerned. Even if one were to assume that some non-tribal Indians may be eligible to share in the distribution, a statute does not offend the Constitution simply because its classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.*,

220 U.S. 61, 78. See *Massachusetts Board of Retirement* v. *Murgia*, No. 74-1044, decided June 25, 1976, slip op. 9; *Flemming* v. *Nestor*, *supra*, 363 U.S. at 612. As with most statutory classifications, imperfections in individual cases will occur, but it is not impermissible to conclude that the amount of the individual monetary awards authorized by the distribution statute would be substantially outweighed in administrative costs and delay by a requirement of case-by-case inquiry instead of substantial reliance on previously-compiled tribal rolls. *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 777; *Mathews* v. *Lucas*, *supra*, slip op. at 14. Regardless of the inevitable imprecision, the statute furthers a legitimate legislative objective in a rational manner; the Due Process Clause requires no more.

The only other basis for the district court's contrary conclusion stems from its consideration of the legislative history of 25 U.S.C. (Supp. IV) 1291-1297, especially the absence of discussion about the Kansas "Delawares," which the court used not as an aid in the proper construction of the statute but as proof of its unconstitutionality. The district court stated that it was "persuaded that it was not the intent of Congress to exclude a group such as the Kansas Delawares from the distribution" (406 F.Supp. 1309).

It is scarcely clear what the court means by "intent of Congress" in this context; still less is it apparent why this has any significance to the constitutional issue presented here. There can be no doubt that the distribution statute will not permit the

Kansas "Delawares" to share in the award and that Congress intended only those specified in the legislation to receive the funds. Indeed, that the statute will have this effect is the precise reason why appellees brought suit. But we perceive no reason why it should make a constitutional difference if the legislative history contained statements by Members of Congress (or others) indicating that they knew the statute would not allow the Kansas "Delawares" to participate. The Due Process Clause cannot mean that legislation is unconstitutional unless the Senators and Representatives voting for it say that they are aware of all its possible ramifications—or perhaps more to the point, that they know not only who will benefit but also who will not.

Courts do not sit as law revision commissions deciding whether an Act of Congress may have expressed inartfully the true legislative intent or whether a different statute would have been enacted if all relevant factors had been brought to the attention of Congress. The task of the judiciary is to compare the text of a statute as enacted with the dictates of the Constitution and to determine whether they square. Moreover, the district court's approach is inconsistent with the rule that, under the "reasonable basis" test of equal protection, "a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts." *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6. See *Salyer Land Co.* v. *Tulare Water District*, 410 U.S. 719, 732; *Dandridge* v. *Williams*, 397 U.S. 471, 485; *McGowan* v. *Maryland*, 366 U.S.

420, 426; Note, *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1078 (1969).

Although we therefore disagree with the approach taken by the court below, we submit that even if the legislative history of a statute could induce a constitutional deficiency into a facially-valid law, nothing in the history of Sections 1291-1297 mandates that result. The Kansas "Delawares" are not mentioned in the congressional hearings or debates, but this silence—which is wholly attributable to the failure of that group to present itself during the legislative process or, indeed, at any time prior to the institution of this litigation[35]—is hardly dispositive. The legislative history does not support the conclusion that exclusion of the Kansas "Delawares" from the distribution is inconsistent with Congress' desire to make an equitable allocation of the Indian Claims Commission judgment.

Congress knew full well that some Indians who may be descended from members of the Delaware Tribe in 1856 and 1857 would not be allowed to share in the distribution authorized by 25 U.S.C. (Supp. IV) 1291-1297. H.R. 5200, the bill originally introduced to distribute the judgment funds, would have revised the payment rolls previously adopted in 25

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[35] See, *e.g.*, Hearings on H.R. 5200 and H.R. 14267 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 92d Cong., 2d Sess. 4 (May 8, 1972); Hearings on H.R. 14267 and H.R. 5200 before the House Committee on Interior and Insular Affairs, 92d Cong., 2d Sess. 5 (May 10, 1972).

U.S.C. 1181-1186, relating to the violation of the 1818 Treaty, "to include the names of all persons born on or prior to and living on the date of this Act who are lineal descendants of members of the Delaware Tribe as it existed in 1854 * * *." After legislative hearings, however, Congress rejected this "catchall" proposal and substituted the recommendation of the Cherokee and Absentee Delawares that participation be limited to persons who could trace their Delaware ancestry to tribal members on the 1906 and 1940 rolls specified in Section 1181(b) and (c).

To be sure, the attention of Congress was directed almost exclusively to the problems raised by the Munsee Indians, a band related to the Delawares, who had attempted to share in the earlier distribution statute, rather than to the Kansas "Delawares" (see J.S. App. 31a-32a), and it is safe to assume that Congress did not know the identity of every group of individuals who might be excluded as a result of its adoption of Sections 1291-1297 without a "catchall" provision.[36] Nonetheless Congress decided

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[36] The Senate Committee had earlier noted, in the course of its consideration of the proper distribution of the judgment relating to the 1818 Treaty, that "[t]here are also other individuals who are lineal descendants of members of the Delaware Nation as it was constituted in 1818, but who are not presently affiliated with either of the Oklahoma Delaware groups. Some, we believe, are affiliated with the Stockbridge-Munsee Indian community in Wisconsin, *and others are not affiliated with any tribal group under Federal supervision.*" S. Rep. No. 1518, 90th Cong., 2d Sess. 4 (1968) (emphasis added). Thus, Congress was on notice that per-

not to distribute the judgment fund solely on the basis of an applicant's ability to trace his descendancy to a member of the Delaware tribe as it existed in 1856 and 1857.[37]

Furthermore, the legislative history reveals the acute concern of Congress that the method of distribution adopted in 25 U.S.C. 1181-1186 had occasioned an inordinate delay in the receipt of funds by eligible Indians. See Hearings 12, 22, 59, 79-80, 97, 105-106, 113. The experience under that statute indicated that the Bureau of Indian Affairs had encouraged participation by a large number of Munsees and had twice re-opened the eligibility proceedings so that they could submit applications. More than 1,500 Munsees eventually applied for a share of the fund and many of these claims were still pending in 1972 (Hearings 95-96). During its consideration of the 1854 Treaty judgment fund, Congress had been expressly advised that "[r]eference to a tribal entity of a given date is an invitation to a repetition of the problems that the Delawares experienced with the B.I.A. in [the distribution under Sections 1181-1186]" (see Letter to Chairman Wayne N. Aspinall, House Committee on Interior and Insular Affairs,

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sons other than the Munsees would be eliminated from distribution of the judgment relating to the 1854 Treaty by the removal of the "catchall" clause.

[37] See, *e.g.*, Hearings 133, 138. See also Hearings on S. 1067 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 92d Cong., 2d Sess. 38-39 (July 21, 1972).

from Bruce Miller Townsend, November 16, 1971, p. 3, included in Hearings 9; see also Hearings 88-93).

The considerable hardship caused by the delay undoubtedly was a significant factor in the ultimate congressional decision to allocate the funds relating to the 1854 Treaty solely to the two existing federally-recognized tribes and to their members. This concern by Congress that undue delay and administrative difficulty not result from the distribution, while expressed solely in the context of the Munsees, likewise justifies exclusion of the Kansas "Delawares" regardless whether participation by that group was a subject of legislative debate.[38]

Finally, as evidenced by the provision of Section 1294(a) and (b) requiring ten percent of the distribution to be placed to the credit of the tribe for purposes approved by the Secretary, the legislative his-

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[38] See, *e.g.*, the following exchange between Robert Bruce of the Bureau of Indian Affairs and Rep. Edmonson (Hearings 138-139):

> Mr. Robert Bruce. * * * [W]e want those Munsees or Delawares who can prove their descendancy from the time of the treaties and the wrong at the time of the treaties—they should be given the opportunity to share in any award, the * * * opportunity to prove that they were there, and that they are lineal descendants. Then we believe from our research that there are a few of these people. * * *
>
> Mr. Edmondson. I have a feeling that the language that you proposed that would exclude only those persons whose Delaware ancestry is derived solely from a person who [severed] his affiliation with the Delaware Nation prior to 1854 is going to present some real administrative problems.

tory suggests that Congress was sympathetic to the request that a portion of the judgment fund be devoted to beneficial tribal uses (see, *e.g.*, Hearings 39) —a still further indication that the resulting exclusion of nontribal Indians such as the Kansas "Delawares" was not, in this sense, unintentional.

We do not contend by the above discussion that the record reflects a deliberate and specific decision aimed at prohibiting the Kansas "Delawares" from participating in the appropriation redressing the government's breach of the 1854 Treaty. What is clear, however, is that any relief from what the district court believed to be a mere legislative oversight must come from Congress and not the courts. The distribution authorized by 25 U.S.C. (Supp. IV) 1291-1297 has not yet occurred and, Congress has the power to alter its initial allotment plan (*United States* v. *Jim*, *supra*, 409 U.S. at 82-83). It is to that body that the claims of the Kansas "Delawares" should appropriately be addressed. Although the thrust of the Kansas "Delawares" legal assertions is that Congress could and should have included them in the distribution, they have failed to demonstrate why Congress' contrary determination, in an area marked by such wide legislative discretion, is unconstitutional.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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